No. 83-366

In the Supreme Court of the United States

OCTOBER TERM, 1983

PENOBSCOT NATION,
APPELLANT,

v.

ARTHUR STILPHEN, COMMISSIONER,
DEPARTMENT OF PUBLIC SAFETY OF THE
STATE OF MAINE,

AND

JAMES E. TIERNEY, ATTORNEY GENERAL,

APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MAINE

MOTION TO DISMISS

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The Appellees, Arthur Stilphen, Commissioner, Department of Public Safety, State of Maine, and James E. Tierney, Attorney General, State of Maine, respectfully move the Court to dismiss the appeal herein on the grounds that the appeal is not within this Court's jurisdiction; that the appeal does not present a substantial federal question; and, that the federal question sought to be reviewed was not timely or properly raised.

STATEMENT OF THE CASE

The Penobscot Nation filed a complaint in Kennebec County Superior Court, State of Maine, on December 6, 1982, seeking a declaration that it was exempt from state regulation because (1) Indian tribes were not covered by Maine anti-gambling laws, and (2) the operation of a beano game was an "internal tribal matter" under the Maine Indian Claims Settlement Act, P.L. 1979, c. 732, 30 M.R.S.A. § 6206(1). When the Kennebec County Superior Court ruled against the Penobscot Nation on both issues, an appeal was taken to the Maine Supreme Judicial Court.

The Maine Supreme Judicial Court upheld the decision of the Kennebec County Superior Court. The Maine Supreme Judicial Court held that Maine's anti-gambling statutes were applicable to the Penobscot Nation and that the operation by the Penobscot Nation of a beano game was not exempt as an "internal tribal matter" from regulation by the State under the terms of the Maine Indian Claims Settlement Acts, 94 Stat. 1785, 25 U.S.C. § 1721 *et seq.*, and P.L. 1979, c. 732, 30 M.R.S.A. § 6201 *et seq.*

JURISDICTION

The Penobscot Nation (Nation) seeks to appeal the judgment entered on June 7, 1983, by the Supreme Judicial Court of Maine. Nation invokes the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(2) by claiming that, as applied, Section 6206(1) of the Maine Implementing Act violates the laws of the United States. *See Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). Specifically, Nation claims that the Maine Court's interpretation of the phrase "internal tribal matters" infringes on tribal sovereignty.

At no time in the course of this case prior to this appeal has Nation drawn into question the validity of 30 M.R.S.A. § 6206(1) nor suggested that 30 M.R.S.A. § 6206(1) was

preempted by federal Indian case law. This untimely assertion of a federal question alone deprives this Court of jurisdiction. *Raley v. Ohio*, 360 U.S. 423, 434-435 (1959).

In the complaint and its subsequent arguments, Nation only urged the Maine Courts to interpret 30 M.R.S.A. § 6206(1) in accordance with federal Indian case law. The Court below refused to do so on the firm grounds that (1) Congress had "approved, ratified, and confirmed" the Maine Implementing Act, P.L. 1979, c. 732, 30 M.R.S.A. § 6201 *et seq.*, as the mandate for determining the jurisdictional relationship between the State and Maine Indians, 94 Stat. 1785, 25 U.S.C. § 1725(b) (1); and, (2) Congress had expressly stated that general "laws[1] and regulations of the United States" applicable to Indians would not apply in the State of Maine if such laws would affect or preempt the State's "civil, criminal or regulatory jurisdiction", 94 Stat. 1785, 25 U.S.C. §§ 1725(h) and 1735(b). Accordingly, the Maine Supreme Judicial Court found

> [i]t would make no sense, in an integrated legislative package, to define the state's jurisdiction with reference to federal case law, while at the same time declaring that the self-same case law has no impact upon the jurisdiction of the State of Maine.

Penobscot Nation v. Stilphen, 461 A.2d 478, 488 (Me. 1983).

The Court below determined the meaning of the phrase "internal tribal matters" by looking to the Maine statute and to the statute's legislative history. *Id.* at 489. The Maine Court's construction of this Maine statute is not subject to review and revision by this Court. *Quong Ham Wah Co. v. Industrial Comm.*, 255 U.S. 445, 448 (1921).

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[1] The term "laws" includes case law. 25 U.S.C. § 1722(d); 30 M.R.S.A. § 6203(4).

QUESTION PRESENTED

May the State of Maine prohibit gambling by the Penobscot Nation consistent with the Maine Indian Claims Settlement Acts, 94 Stat. 1785, 25 U.S.C. § 1721 *et seq.*, and P.L. 1979, c. 732, 30 M.R.S.A. § 6201, *et seq.*?

ARGUMENT

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

A. THE DECISION OF THE MAINE SUPREME JUDICIAL COURT IS NOT IN CONFLICT WITH OTHER COURT DECISIONS ON THE REGULATION OF INDIAN GAMBLING.

The Maine Supreme Judicial Court decided, as a matter of statutory construction, that Nation's beano game is not an "internal tribal matter" and thus not shielded from the operation of Maine's anti-gambling statutes. This decision is not in conflict with the cases,[2] cited by Nation, which arose in Pub. L. 280 states, 67 Stat. 588, 18 U.S.C. § 1161, 28 U.S.C. § 1360. These cases were governed by *Bryan v. Itasca County*, 426 U.S. 373, 384 (1976), which held that Pub. L. 280 did not confer "general state civil regulatory control over Indian reservations." The situation in Maine is different. Maine is not a Pub. L. 280 state and Congress has expressly conferred upon the State general civil, criminal and regulatory jurisdiction over Maine Indians. 25 U.S.C. §

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[2] *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, _____U.S._____, 103 S.Ct. 2091 (1983); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Oneida Tribe of Indians v. State of Wisconsin*, 518 F.Supp. 712 (W.D. Wis. 1981).

1725(b) (1);[3] 30 M.R.S.A. §§ 6204 and 6206(1); *Cf. Id.* at 389.

B. THE DECISION OF THE MAINE SUPREME JUDICIAL COURT IS NOT IN CONFLICT WITH OTHER COURT DECISIONS ON THE APPLICABILITY OF STATE LAWS TO INDIANS.

As pointed out above, Congress has expressly and unambiguously declared that federal Indian case law does not apply in Maine. 25 U.S.C. §§ 1725(h) and 1735(b). This case, then, is not guided by the presumption in favor of Indians, *Bryan v. Itasca County, supra* at 392, and does not present an occasion for analysis whether state regulation of Indian activities interferes with "reservation self-government" or impairs "a right granted or reserved by federal law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *McClanahan v. Arizona State Tax Comm.*, 411 U.S. 164, 170-172 (1973); *Rice v. Rehner*, ____U.S.____, 103 S.Ct. 3291, 3294-3295 (1983). Nevertheless, the decision of the Court below is consistent with federal case law on the applicability of State laws to Indians in the face of a claim of preemption. *See Rice v. Rehner*, 103 S.Ct. at 3296-3298.

The Court below found, and Nation does not dispute, that gambling "has played no part in the Penobscot Nation's historical culture or development." *Penobscot Nation v. Stilphen*, 461 A.2d at 490. There is thus "no tradition of sover-

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[3] "The phrase 'civil, criminal, or regulatory jurisdiction' as used in this section [25 U.S.C. § 1725(h)] is intended to be broadly construed to encompass the statutes and regulations of the State of Maine as well of the jurisdiction of the courts of the State. The word 'jurisdiction' is not to be narrowly interpreted as it has in cases construing the breadth of Public Law 83-280 [Public Law 280] such as *Bryan v. Itasca County*, 426 U.S. 373 (1976)." S. REP. NO. 957, 96th Cong., 2nd Sess. 30-31 (1980)

eign immunity in this respect" and little, if any, weight need be accorded "any asserted interest in tribal sovereignty in this case." *See Rice v. Rehner*, 103 S.Ct. at 3298. It is against this "backdrop" and the absence of express congressional pre-emption that Nation's claim of pre-emption must be examined and rejected. *Id.* 103 S.Ct. at 3295, 3298-3299. The State has a substantial interest in regulating gambling, the evil effects of which "spillover" and reach "the whole community". *Penobscot Nation v. Stilphen*, 461 A.2d at 487. *Cf. New Mexico v. Mescalero Apache Tribe*, _____U.S._____, 103 S.Ct. 2378, 2387 (1983). Maine simply does not infringe on tribal self-government merely because the regulation of gambling by the Nation will deprive the Nation of revenues it is currently receiving.[4] *Cf. Washington v. Confederated Tribes*, 447 U.S. 134, 156 (1980). In the area of gambling, Nation cannot point to any "congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980); *Cf. Rice v. Rehner*, 103 S.Ct. at 3298.

C. THE QUESTION PRESENTED IS NOT OF GENERAL IMPORTANCE.

Regardless of the outcome of this case, only the State of Maine and Maine Indians will be affected. The Maine Indian Claims Settlement Acts, 94 Stat. 1785, 25 U.S.C. § 1721, *et seq.*, and P.L. 1979, c. 732, 30 M.R.S.A. § 6201, *et seq.*, apply only to the State of Maine and Maine Indians. Contrary to the assertions of the Penobscot Nation, this

[4] "The tribe's interest in beano. . . is purely financial. And in point of fact, the Penobscots would have nothing to 'sell' if highstakes beano were not prohibited throughout the rest of Maine." *Penobscot Nation v. Stilphen*, 461 A.2d at 486.

case does not involve the "defiance of federal Indian Law", but merely the interpretation of a Maine statute. Indeed, federal Indian law is expressly made inapplicable to the State of Maine. 25 U.S.C. §§ 1725(h) and 1735(b). Equally false is the Nation's claim that the Settlement Acts touched only land, water and fishing rights. The principle purpose of the Settlement Acts was to lay to rest the jurisdictional dispute between the State and Maine Indians. 25 U.S.C. § 1721(b)(3). "Relations between the Penobscot Nation, the State of Maine, and the federal government are now controlled..." by the Settlement Act. *Penobscot Nation v. Stilphen*, 461 A.2d at 482.

II. THE DECISION BELOW RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

The Court below held that (1) under federal Indian law, and (2) under the Maine Implementing Act, 30 M.R.S.A. § 6206(1), the Nation was not immune from the application of Maine's anti-gambling statutes. *Penobscot Nation v. Stilphen*, 461 A.2d at 482. The Nation has focused its attack in this appeal on the federal Indian law holding. The decision of the Maine court, however, was correct without regard to this issue. Thus, this Court need not reach the alleged federal-state conflict the Nation seeks to have resolved.

The question presented to the Court below was whether the Nation's gambling operations were immune from State regulation as an "internal tribal matter". *Penobscot Nation v. Stilphen*, 461 A.2d at 488. In answering this question in the negative, it was only necessary for the Maine Court to interpret the Maine Implementing Act, 30 M.R.S.A. § 6206(1). The Maine Court, as a matter of state law, and as a matter of statutory interpretation, construed the phrase "internal tribal matters" to include only matters unique to the cultural and historical existence of the Nation. *Id*, at 490. This construction of the State statute is an adequate non-federal basis for the decision of the Maine Court and does

not present an appropriate occasion for review by the U.S. Supreme Court.

CONCLUSION

Wherefore, Arthur Stilphen and James E. Tierney, respectfully submit that this Court lacks jurisdiction to hear this appeal and that the question presented is so unsubstantial as not to need further argument and respectfully request the Court dismiss this appeal.

Respectfully submitted,

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Assistant Attorney General

Counsel for Appellees

Dated: October 5, 1983